

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of)

BRUCE THOMPSON,)

Petitioner,)

For an Order Pursuant to *CPLR* Article 75,
Confirming an Arbitration Award,)

- against -)

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION;
and ANTHONY J. ANNUCCI as Acting Commissioner
of the NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,)

Respondents.)

VERIFIED PETITION

Index No. _____

Date Filed: April 12, 2019

RJI No. _____

Justice _____

ORAL ARGUMENT
IS REQUESTED ☒

Petitioner, by his attorney, Edward J. Aluck, Esq. (Darien J. Smith, Esq., Of Counsel), as
and for his Petition under Article 75 of the *Civil Practice Law and Rules*, N.Y. C.P.L.R. §7501
et seq. ("*CPLR*"), respectfully alleges as follows:

NATURE OF PROCEEDING

1. This proceeding is brought pursuant to *Civil Practice Law and Rules* ("*CPLR*")
Article 75 to confirm a final and binding arbitration Award issued by Arbitrator E. David
Hyland, Esq. on April 26, 2018 (the "Amended Award").

VENUE

2. Venue is designated in Albany County pursuant to *CPLR* §7502, as respondents
New York State Department of Corrections and Community Supervision ("DOCCS") maintains
its headquarters in the County of Albany.

-2-

PETITIONER

3. Petitioner Bruce Thompson is over the age of 21 years and resides in North Syracuse, New York.

4. At all relevant times herein, Mr. Thompson was employed by Respondent DOCCS as a Senior Librarian at DOCCS's Mid-State Correctional Facility.

5. Petitioner's position as a Senior Librarian with respondent DOCCS is in the Professional, Scientific and Technical Services ("PS&T") bargaining unit of State employees.

RESPONDENTS

6. Respondent DOCCS is an office within the Executive branch of State government, created pursuant to *Corrections Law* Article 2.

7. Respondent DOCCS maintains an office in Albany County, located at The Harriman State Campus, 1220 Washington Avenue, Albany, New York 12226.

8. Respondent Anthony J. Annucci ("Annucci") is the Acting Commissioner of DOCCS, with the powers and duties conferred upon him by *Corrections Law* Article 2, the Constitution of the State of New York, and all other applicable laws and regulations.

FACTS

9. The New York State Public Employees Federation, AFL-CIO ("PEF") is the duly recognized and certified bargaining representative for the PS&T Unit of State employees.

10. At all relevant times herein, Petitioner Thompson was a member of the PS&T Unit of State employees.

11. Pursuant to Article 14 of the *Civil Service Law* ("*Taylor Law*"), PEF and the State of New York entered into a Collective Bargaining Agreement ("Contract") governing the terms

-3-

and conditions of employment for all PS&T Unit members, including the Petitioner, at all relevant times herein.

12. Respondents are, and were at all relevant times herein, bound by all of the requirements and provisions contained in the Contract.

13. Article 33 of the Contract is the disciplinary provision and it sets forth the procedure for disciplinary grievances, which culminate in final and binding arbitration before an impartial Arbitrator designated by the American Arbitration Association ("AAA") from a panel of arbitrators selected by the State of New York and PEF. (A copy of Article 33 is annexed to the Petition as Exhibit A.)

14. Mr. Thompson, a Senior Librarian employed by DOCCS for thirteen (13) years, was issued workplace disciplinary charges in a formal Notice of Discipline ("NOD") dated January 20, 2016, seeking his termination (pursuant to Article 33 of the Contract), alleging, in substance, that he gave cookies to his inmate library assistant staff on Christmas Eve 2015, and did not adequately supervise their use of the closed (no internet access) library book cataloguing computer system.

15. He was ultimately found not guilty of "undue familiarity" with inmates (NOD Charge 2) and not guilty of lying to DOCCS investigators about his conduct (NOD Charge 6) and those Charges were dismissed.

16. No injury to any person (and also no stoppage of, or interference with, DOCCS' operations) was ever alleged or proved.

17. The Petitioner was never arrested for any of his alleged behavior specified in the NOD.

-4-

18. Under the mandated requirements of Article 33.4(a) of the Contract, suspension without pay pending a workplace arbitration hearing is a drastic remedy reserved for only the most egregious situations: where the employee was arrested and charged with a crime (which Mr. Thompson was not) or when the employee's mere presence in the workplace (a secure prison facility) poses a danger to persons or property or severely interferes with the employer's operations (which Mr. Thompson's mere presence in the secure correctional facility workplace did not).

19. The Contract imposes a heavy burden upon the employer, DOCCS, to demonstrate sufficient probable cause to justify such a suspension that occurs before the employee, Petitioner, has had any due process hearing to defend himself, before he even knows what the charges are against him, and before he has been found guilty of any misconduct.

20. In all but the most violent and egregious circumstances, there is no reason why the employee cannot continue to work for the State while he receives workplace discipline charges, files a grievance and his arbitration runs its course.

21. Nonetheless, prior to any due process hearing, on or about January 12, 2016, DOCCS made a determination to suspend the Petitioner (Mr. Thompson) without pay.

22. A written "reason for suspension," dated January 12, 2016, was also purportedly authored by a "Joseph T. Ward" that stated only:

Reason for suspension: inappropriate and
unauthorized dealings with inmates.

23. The Petitioner, Mr. Thompson, duly filed a grievance and demand for arbitration, under Article 33 of the Contract, contesting the charges and his suspension.

-5-

24. Pursuant to the Contract, the American Arbitration Association (“AAA”) designated Arbitrator E. David Hyland, Esq., from the panel of carefully vetted arbitrators agreed upon by the State and PEF, to hear the case and render a final and binding award as to: (1) whether any discipline was appropriate; (2) what, if any, disciplinary penalty was appropriate; and (3) the entirely separate (and different) question of whether DOCCS established that it had the contractually mandated probable cause to suspend the Petitioner, pre-due process, on or about January 12, 2016.

25. Hearings before Arbitrator Hyland were held on September 7, 8 and October 18, 2016.

26. The Employer/DOCCS is and was contractually mandated, by Article 33.4(a) of the Contract, to shoulder the extremely heavy burden of demonstrating to the Arbitrator that it met the required contractual grounds for the drastic action of pre-hearing suspension without pay pending the outcome of Petitioner’s arbitration.

27. Arbitrator Hyland gave DOCCS every opportunity to submit any witness or “proof” it desired.

28. Yet, at hearing, nearly 9-months after the suspension, when it came time for DOCCS to show Arbitrator Hyland that DOCCS had the requisite probable cause to suspend, DOCCS voluntarily chose a perilous strategy of not calling a witness with firsthand knowledge of the suspension.

29. DOCCS also voluntarily chose not to present any testimony from “Joseph T. Ward.”

-6-

30. Arbitrator Hyland did not, in any way, preclude or prevent the Respondents from calling witnesses in the arbitration hearing as to why (and upon what basis), on January 12, 2016, DOCCS decided to suspend the Petitioner.

31. The insufficient written suspension notice was unsworn and not in evidentiary form.

32. In lieu of firsthand testimony, DOCCS instead chose to present (and to rely upon) the unsworn, terse and empty written "suspension notice" on the issue of whether DOCCS had sufficient probable cause to suspend.

33. An arbitrator, under the Contract, may order that back pay be provided for "all or part of any period of suspension[]," if the suspension was ruled to be improper. (*See*, Article 33.5(f)(5) of the Contract, annexed as Exhibit A).

34. Further, pursuant to Article 33.5(f)(5) of the Contract:

[t]he disciplinary arbitrator's decision with respect to guilt or innocence, penalty, probable cause for suspension, or temporary reassignment, if any, and a claimed failure to follow the procedural provisions of this Article, shall be final and binding on the parties. [Exhibit A, emphasis added]

35. Nearly a year after DOCCS' unexplained decision to suspend, Arbitrator Hyland painstakingly reviewed, carefully weighed and expressly considered all the proof, including the complete testimony of DOCCS' witnesses. (January 17, 2017 final and binding Opinion and Award, attached hereto as Exhibit B, at pp. 42-43, 5-13)

36. Arbitrator Hyland reviewed the testimony of DOCCS' witnesses and the content of DOCCS' exhibits. (January 17, 2017 final and binding Opinion and Award, Exhibit B at pp. 42-43, 5-13)

-7-

37. The issues at the arbitration hearing were:

1. Is there just cause to discipline Bruce Thompson for the charges contained in the Notice of Discipline dated January 20, 2016?
2. If there is just cause, is the proposed penalty of termination appropriate? If not, what is the appropriate penalty, if any?
3. Did the State's suspension of Grievant on or about January 12, 2016 meet the standard established under Article 33.4 of the parties' collective bargaining agreement and, if not, what shall the remedy be? [Exhibit B at p. 4 of 44]

38. After three days of hearing, careful consideration of all the evidence in the record before him and a thorough 44-page analysis, Arbitrator Hyland reached the conclusion, per the Contract, that DOCCS failed to establish sufficient probable cause to suspend; and, therefore, must restore Petitioner's back pay for the unjustified suspension.

39. The Arbitrator specifically addressed the suspension issue (issue #3 above) and held as follows: "Based on the evidence in the record, the State failed to establish probable cause to suspend Grievant effective January 12, 2015 [sic]. Accordingly, Grievant is entitled to make whole relief for the period of his suspension through the date of this Opinion and Award." (Original Award Exhibit, B at p. 43 of 44).

40. The Arbitrator also, in relevant part, made the following final and binding Award:

Award

The grievance is granted in part and denied in part

-8-

3. The State did not establish probable cause to impose a pre-hearing suspension without pay on January 12, 2016. Grievant is entitled to full back pay and benefits from the first date of suspension through and including the date of this Opinion and Award. No other relief is due or warranted. [Emphasis added, Award at Ex. B, p. 44 of 44]

41. Thus, pursuant to the January 17, 2017 final and binding Award, Respondents were directed to pay the Petitioner: “full back pay and benefits from the first date of suspension [January 12, 2016] through and including the date of this Opinion and Award [January 17, 2017].”

42. Under Article 33.5(f)(5) of the Contract:

[t]he disciplinary arbitrator’s decision with respect to guilt or innocence, penalty, probable cause for suspension, or temporary reassignment, if any, and a claimed failure to follow the procedural provisions of this Article, shall be final and binding on the parties. [Exhibit A]

43. Arbitrator Hyland’s January 17, 2017 Award was final and binding on the Respondents concerning the full back pay and benefits and also DOCCS’ complete lack of probable cause for its wrongful suspension of Petitioner without pay on January 12, 2016.

44. In response, DOCCS flouted the Award and the Contract and flatly refused to pay the Petitioner his back pay set forth in the Award.

45. Petitioner was then forced to bring a *CPLR* Article 75 proceeding in State Supreme Court in order to confirm the Award and compel DOCCS to finally comply with the Award; and finally pay Petitioner his back pay.

-9-

46. In Court, Respondents praised that part of the Award they liked, which found the Petitioner guilty of some charges and terminated his State employment, but cross-moved to vacate only that part of the Award they did not like, which held that DOCCS failed to establish the requisite probable cause to suspend.

47. The Supreme Court, Albany County, Hon. Gerald Connolly remitted the third issue (the appropriateness of the suspension itself) of the original award for reevaluation in light of recent rulings. (Court Order Remitting the case back to Arbitrator Hyland, Attached hereto as Exhibit C)

48. Arbitrator Hyland again painstakingly reviewed all the testimony and evidence, on remitter, and again issued a meticulous 7 page Amended Award dated April 26, 2018 wherein he again held and directed DOCCS to restore Petitioner's back pay for the period of the improper suspension. (Amended Award annexed hereto as Exhibit D)

49. In response, DOCCS again defied the new Amended Award and the PEF/State Contract and flatly refused to pay the Petitioner his back pay set forth in the Amended Award.

50. Despite the passage of now more than 2 years since the original final and binding Award, DOCCS has still refused to honor the Award, the Amended Award, the Contract and the entire disciplinary process that has endured between the parties for decades; and has still failed to restore the Petitioner's back pay.

51. Thus, the final and binding Amended Award should be confirmed in its entirety because (1) the Arbitrator's (now second) decision on the lack of probable cause to suspend was well-within the express scope of his authority under the Contract: "[t]he disciplinary arbitrator's decision with respect to guilt or innocence, penalty, probable cause for

-10-

suspension, or temporary reassignment, if any, and a claimed failure to follow the procedural provisions of this Article, shall be final and binding on the parties.” [Article 33.5(f)(5) of the Contract, Ex. A, emphasis added]; and (2) Arbitrator Hyland exhaustively, carefully and expressly considered and weighed all the evidence in the record before him.

52. Despite the passage of Respondents’ time within which to seek modification or *vacatur* of the Amended Award, Respondents failed to make any timely application to modify or vacate.

53. Respondents have failed and refused to provide any legitimate basis for spurning the Amended Award and the Contract, and, upon information and belief, cannot assert any non-frivolous grounds to continue ignoring the Amended Award.

54. Respondents’ refusal to implement the Amended Award has resulted in Mr. Thompson being deprived of his wages and benefits to which he is lawfully and contractually entitled; together with the unwarranted stigmatization of the wrongful continuation of his suspension without pay. Further, upon information and belief, Mr. Thompson continues to suffer a lapse, from January 12, 2016 (the date of his wrongful suspension) through January 17, 2017 (the date of the original Award) in his employment record, and perhaps even harm to his retirement benefits, due to Respondents’ refusal to correct his wrongful suspension.

55. The final and binding Amended Award is in all respects proper and is well within the scope, jurisdiction and authority of the Arbitrator under the Contract and State law and should be fully confirmed.

56. New York State public policy strongly favors upholding final and binding arbitration awards like that of Arbitrator Hyland in the case at bar.

-11-

57. Upon confirmation of the final and binding Amended Award, Petitioner Thompson is entitled to be paid full pay and benefits from the date of his wrongful suspension (January 12, 2016) to the date of the original Award (January 17, 2017) together with full interest at the statutory rate.

WHEREFORE, Petitioner respectfully requests, in accordance with *CPLR* §§7510 and 7514, that the Court issue and enter an Order and Judgment, in favor of the Petitioner and against the Respondents, ordering, granting and directing the following relief:

- (a) confirming the final and binding Amended Award of Arbitrator E. David Hyland, Esq. dated April 26, 2018;
- (b) directing that Respondents immediately correct Petitioner's employment record to show that he was not suspended (and that the wrongful suspension, from January 12, 2016 through January 17, 2017, was not upheld by the final and binding Amended Award);
- (c) returning and reinstating Petitioner to the payroll and making him whole with full pay and benefits from January 12, 2016 (the date when the unlawful, wrongful and improper suspension without pay began) through January 17, 2017 (the date of the original Award);
- (d) directing that Respondents immediately pay to the Petitioner his retroactive check for back pay from January 12, 2016 (the date when the unlawful, wrongful and improper suspension without pay began) through January 17, 2017 (the date of the original Award);

-12-

- (e) granting Petitioner interest at the statutory rate upon the amount of his full pay and benefits and any other sum awarded: from January 12, 2016 (the date when the unlawful, wrongful and improper suspension without pay began) through January 17, 2017 (the date of the original Award); and also interest at the statutory rate from the date (April 26, 2018) of the final and binding Amended Award to and until the date when the Respondents fully satisfy and implement the final and binding Amended Award and fully satisfy the order and judgment herein confirming the Amended Award in full; fully correct his employment record; made Petitioner whole with full pay and benefits; and until the full amount of pay, benefits and interest is paid by Respondents to the Petitioner;
- (f) awarding Petitioner the costs, fees, interest and disbursements of this proceeding; and
- (g) granting Petitioner such other and further relief, in his favor and against the Respondents, as may be deemed just and proper.

DATED: April 12, 2019
Albany, New York

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By: 

DARIEN J. SMITH, ESQ.
Of Counsel

ATTORNEY VERIFICATION


STATE OF NEW YORK)
) SS.:
COUNTY OF ALBANY)

DARIEN J. SMITH, an attorney admitted to practice in the courts of New York State, and is Of Counsel to Edward J. Aluck, Esq., attorney for Petitioner, affirms the following under penalty of perjury pursuant to *CPLR* §2106.

I am an attorney in the Office of General Counsel for the NYS Public Employees Federation and I have been assigned this matter. As such, I am acquainted with the pleadings, exhibits, papers submitted, and proceedings to date. I have personally read the foregoing Verified Petition, and know the contents thereof; the same is true to my own knowledge, except as to matters stated to be alleged on information and belief, and as to those matters I believe them to be true. This verification is made by myself and not by Petitioner Thompson because he is not within the county in which I have my office.

The grounds for my belief as to all matters not stated upon my own personal knowledge are as follows: examination of the file, along with other relevant documents, and confidential conversations with Petitioner Thompson.

DATED: April 12, 2019
Albany, New York


DARIEN J. SMITH, ESQ.